IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 3:08-cr-0048-JAJ

VS.

KERWIN LAMONT SUMMAGE,

Defendant.

ORDER

This matter comes before the Court pursuant to the government's Notice Regarding Evidence (Dkt. No. 25) and defendant's Motion in Limine (Dkt. No. 31). The Court held a hearing on the matter on June 18, 2008, where Clifford Cronk represented the government and Anne Laverty represented the defendant. The government seeks to introduce evidence of a prior crime of child molestation, specifically, a 1997 crime in which Summage was charged in Georgia with child molestation and first-degree cruelty to children. The Court grants the government's request to admit such evidence and denies defendant's motion in limine as it pertains to the past child molestation evidence.

Under Rule 414, past crimes of child molestation are admissible to show a propensity to act in conformity therewith. See United States v. Horn, 523 F.3d 882, 887 (8th Cir. 2008); United States v. Gabe, 237 F.3d 954 (8th Cir. 2001); United States v. Withorn, 204 F.3d 790, 794 (8th Cir. 2000); United States v. LeCompte, 131 F.3d 767, 770 (8th Cir. 1997). The Eighth Circuit Court of Appeals has repeatedly stated that Rule 414 is an exception to Rule 404(b)'s exclusion of past crimes to show a propensity to commit such crimes. Withorn, 204 F.3d at 794 (Rule 414 is a "provision[] that create[s] exceptions to the general rule that evidence of past crimes may not be used 'to prove the character of a person in order to show action in conformity therewith'"); LeCompte, 131 F.3d at 769 ("'The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b).'" (quoting 140 Cong. Rec. H8992 (daily ed. Aug. 21,

1994) (statement of Rep. Molinari)). In <u>United States v. Bentley</u>, the court quoted legislative history to explain the purpose of Rule 414:

[A] history of similar acts tends to be exceptionally probative because it shows an unusual disposition of a defendant – a sexual or sado-sexual interest in children – that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense.

<u>United States v. Bentley</u>, 475 F. Supp.2d 852, 856 (quoting 140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole)).

1. Whether Summage's Past and Present Crimes Qualify Under Rule 414

In order to admit evidence of past crimes of child molestation under Rule 414, both the offense charged and the past crime must qualify as an "offense of child molestation." FED. R. EVID. 414(a), (d). Under Rule 414(d), an "'offense of child molestation' means a crime under Federal law or the law of a State . . . that involved"

- (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
- (2) any conduct proscribed by chapter 110 of title 18, United States Code;
- (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
- (4) contact between the genitals or anus of the defendant and any part of the body of a child;
- (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
- (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

FED. R. EVID. 414(d). All three of the defendant's present federal charges fall under Chapter 110. He is charged with two counts of Production of Child Pornography, in

violation of 18 U.S.C. § 2251(a), (e), and one count of Possession of Child Pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). Both statutes are within Chapter 110 of the United States Code and therefore are qualifying crimes under 414(d)(2).

The defendant's past crimes also fall under Rule 414(d). The past crimes at issue are the defendant's charges of child molestation and first-degree cruelty to children in Georgia. See O.C.G.A. § 16-6-5 (child molestation); § 16-5-70 (cruelty to children). The defendant has been charged but not convicted of these crimes. The official commentary to Rule 414 indicates that evidence of an uncharged crime may be admitted "if the prosecution provides enough evidence to support a finding, by a preponderance of the evidence, that the defendant committed the act." FED. R. EVID. 414 cmt. 5. While the Georgia crimes have been charged, the defendant's conviction has been overturned. Therefore, the Court finds it appropriate to make a finding as described in Comment 5 to Rule 414. The Court heard the testimony of the victim, C.M., and is convinced that she is truthful and that a jury could find by a preponderance of the evidence that the crime occurred.

The indictment in the Georgia case charged the defendant with:

(1) telling C.M.² to remove her panties and get into certain poses that would expose her vaginal area and buttocks so that he could take pictures of her in these poses, (2) showing C.M. photographs of females and males in sexually explicit poses, (3) rubbing his penis against C.M.'s body and buttocks and (4) causing C.M. excessive mental pain by engaging in these acts.

Summage v. State, 248 Ga. App. 559, 560-61 (Ga. Ct. App. 2001). These charges fall under conduct described in Rule 414(d)(2), (3), (4). First, the conduct of taking pictures

¹ The Georgia Court of Appeals reversed and remanded Summage's March 18, 1999 conviction in 2001. <u>Summage v. State</u>, 248 Ga. Ct. App. at 564. The case is still pending in Georgia.

² "C.M." are the initials of the seven-year-old child that the defendant allegedly molested.

of C.M. is proscribed under chapter 110 of title 18; specifically, 18 U.S.C. § 2251, which criminalizes inducing a child to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct." § 2251(a). Therefore it qualifies under 414(d)(2). The conduct also qualifies under subsection (d)(3) and (4), as the defendant is charged with "rubbing his penis against C.M.'s body and bottucks. . . ." In sum, the conduct described in the indictment is a "crime of child molestation" under three different definitions listed in Rule 414(d).

2. Rule 403 Analysis

Before admitting evidence of the defendant's past conduct, the Court must first conduct a Rule 403 balancing analysis. See LeCompte, 131 F.3d at 769; United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) ("Evidence admitted under [Rule 414] is subject to Rule 403."). Rule 403 allows exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." FED. R. EVID. 403. In conducting the analysis, the Court recognizes the congressional intent allowing admission of child molestation crimes. "The presumption is in favor of admission. The underlying legislative judgment is that the evidence admissible pursuant to [Rule 414] is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects." Sumner, 119 F.3d at 662. "Rule 403 must be applied in this context in a manner that permits Rules 413 and 414 to have their intended effect, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity." United States v. Benais, 460 F.3d 1059, 1063 (8th Cir. 2006).

Here, the evidence that the government seeks to introduce – evidence of a past crime of child molestation – is highly probative of the defendant's propensity to commit sexual molestation crimes. In analyzing the probative value of evidence, other courts have

looked at the similarity between the past crime(s) and the present crime. See United States v. Gabe, 237 F.3d 954, 959 (8th Cir. 2001) ("The abuse alleged by Thompson was almost identical to the abuse of V.G. alleged in Count I. Both were young girls of six or seven years at the time of the offenses; both were related to Gabe; and the sexual nature of the offenses was similar."); United States v. Bentley, 475 F. Supp.2d 852, 858 (N.D. Iowa 2007) (finding probative the similarities between the crimes such as age, gender, and location of the crimes).

The defendant's past crime is similar to the conduct alleged in Count 2 of the indictment, which alleges that he used or employed "a female approximately three years of age, to engage in sexually explicit conduct, including the lascivious exhibition of the genital area." (Redacted Indictment, Dkt. No. 2). This is very similar to the conduct alleged in the Georgia indictment. First, the crimes both involve young girls – the Georgia crime involved a seven year old and the present crime alleges conduct with a three year old. Second, the crimes are very similar. Both crimes allege that the defendant produced visual depictions of a young girl's genital area. Based on these factors, the Court finds the evidence of his past sexual molestation crime is highly probative due to the similarities to the present allegations.

This probativeness is weighed against the likelihood that such evidence will have a prejudicial effect. Defendant argues, "Although it may be logically relevant, 'propensity' or 'bad character' evidence is deemed to carry unacceptable risk that the jury will convict Defendant for crimes other than those charged." (Deft. Br. at 2). However, in the enactment of Rule 414, Congress deemed that risk acceptable because, as discussed above, such evidence is "exceptionally probative' of a defendant's sexual interest in children," in addition to the difficulty of attaining evidence of past sexual molestation of children. Withorn, 204 F.3d at 794 (citing 140 Cong. Rec. H3991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari)). The defendant has not argued that there will be any

unfair prejudice beyond what Congress contemplated in the enactment of 414. <u>See Withorn</u>, 204 F.3d at 794-95 (finding no "danger of unfair prejudice beyond that which all propensity evidence in such trials presents, but is now allowed under Rule 413 [and 414]").

The Court also notes that the Eighth Circuit Court of Appeals has never overturned a trial court for allowing Rule 414 evidence over a Rule 403 objection, but has overturned a trial court for disallowing the admission of Rule 414 evidence. See Bentley, 475 F. Supp.2d 852, 857 n.4 (2007) (citing numerous cases upholding trial courts' admission of Rule 414 evidence and citing LeCompte, 131 F.3d at 768-70, which reversed the trial court's exclusion of 414 evidence). This is likely a reflection of the strong legislative intent to admit evidence of past crimes of child molestation.

To limit the prejudicial effect of the material, the Court will give a limiting jury instruction, explaining to the jury how the evidence should be used. See <u>United States v. Carter</u>, 410 F.3d 1017, 1022 (8th Cir. 2005) (affirming the admission of Rule 414 evidence where the trial court gave "a cautionary instruction with respect to how the witnesses' testimony should be used."); <u>United States v. Mound</u>, 149 F.3d 799, 802 (8th Cir 1998) (same); <u>United States v. Horn</u>, 523 F.3d 882, 889 (8th Cir. 2008) (same).

For the foregoing reasons, the Court finds that the evidence's probative value outweighs its prejudicial effect and may be admitted pursuant to Rule 414.

IT IS SO ORDERED.

DATED this 26th day of June, 2008.

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SOUTHERN DISTRICT OF IOWA